United States Court of Appeals

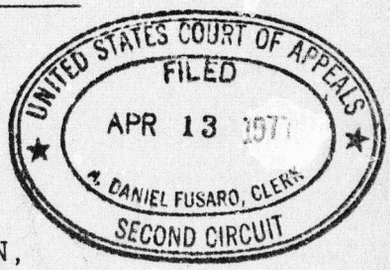
for the Second Circuit

BRIEF FOR APPELLEE

77-7134

To be argued by
Richard Littell

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

Plaintiffs-Appellees,

-against-

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

Defendants-Appellants.

BPLS

On Appeal From An Order
Of The United States District Court
For The Southern District Of New York

BRIEF OF PLAINTIFFS-APPELLEES

Dickstein, Shapiro & Morin
Attorneys for Plaintiffs-Appellees
745 Fifth Avenue
New York, New York 10022

Arthur J. Galligan
Richard Littell
Barry Wm. Levine
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii,iv,v,vi

ISSUES PRESENTED.....vii

COUNTERSTATEMENT OF THE CASE.....1

Preliminary Statement.....1

Proceedings Below.....3

The Facts.....4

ARGUMENT.....8

Summary of Argument.....8

I. THE ORDERS BELOW ARE NON-APPEALABLE.....10

II. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF PRIMARY JURISDICTION.....16

A. The Relevant Authorities Allow The Federal Courts To Grant An Injunction Under Section 1007(a) Without Prior Resort To The CAB.....16

B. The Appellants' Authorities Are Inapposite.....20

C. The Issue Here Is One Which Courts Are Competent To Decide.....25

III. THIS COURT ACTION IS NOT BARRED BY THE FILING OF AN INFORMAL COMPLAINT BEFORE THE CAB--OR BY THAT AGENCY'S INVESTIGATION OF BROADER VIOLATIONS.....29

A. The Existence Of An Informal Complaint Does Not Constitute An "Election Of Remedies".....29

B. The CAB's On-Going Investigation Does Not Oust The District Court Of Jurisdiction.....32

V. THIS COURT ACTION DOES NOT INTRUDE UPON PAST OR FUTURE CAB DETERMINATIONS.....35

A. The CAB Has Never Made A Determination That TAS Is Free Of TWA Control.....35

B. The CAB Is Not Contemplating Changes In Its Regulations Which Will Legalize TWA's Control Over The Travellers Group.....38

CONCLUSION.....40

TABLE OF AUTHORITIES

Cases

Alaska Int'l Air, Inc. v. Southern Air Transport, ___ F.Supp. ___, (S.D. Fla Case No. 76-2088-Civ-NCR, decided Feb. 3, 1977) 30, 31

American Airlines v. Standard Airlines, Inc., 80 F.Supp. 135 (S.D.N.Y. 1948) 20

American Communications Association v. United States, 298 F.2d 648 (2 Cir. 1962) 16

Arrow Airways v. CAB, 182 F.2d 705 (D.C. Cir. 1950), cert. denied, 340 U.S. 828 (1951) 37

CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2 Cir. 1974) 9, 11, 12, 18, 19, 22

CAB v. Modern Air Transport, Inc., 179 F.2d 622 (2 Cir. 1950) 9, 17, 18, 24

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 9, 10, 13, 14

Danna v. Air France, 463 F.2d 407 (2 Cir. 1972) 24

Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912 (D.C. Cir. 1973) 37

DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9 Cir. 1975) 23, 24

Far East Conference v. United States, 342 U.S. 570 (1952) 21

Flying Tiger Line v. Atchison, Topeka & Santa Fe Ry. Co., 75 F.Supp. 188 (S.D. Cal. 1947) . . . 16, 31

Foremost Int'l Tours, Inc. v. Qantas Airways, Ltd., 525 F.2d 281 (9 Cir. 1975), cert. denied, 45 U.S.L.W. 3249 (Oct. 5, 1976) 21, 23

Hughes Tool Co. v. TWA, 409 U.S. 363 (1973) 21

Hines v. D'Artois, 531 F.2d 726 (5 Cir. 1976) 15

Hunt Oil Co. v. FPC, 334 F.2d 474 (5 Cir. 1964) 16

Local 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963). 13

Local 771, I.A.T.S.E., A.F.L.-C.I.O. v. RKO General, Inc., WOR Division, ___ F.2d ___, (2d Cir. Slip. Op. March 3, 1977 Docket No. 76-7430) 11, 12

Mercantile Nat'l Bank v. Langeau, 371 U.S. 555 (1963) 13

Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 522 (9 Cir. 1972). 9, 19

Nader v. Air Transport Ass'n of America, et al., ___ F.Supp. ___, 1977 CCH Trade Cases ¶ 61,280 (D.D.C. 76-1180, Feb. 9, 1977) 21

Nats Air Transp. Serv., Enf. Proceeding, 10 C.A.B. 57 (1949) 21

NLRB v. Standard Oil Co., 138 F.2d 885 (2 Cir. 1943). 24

Northeast Airlines, Inc. v. World Airways, Inc., 237 F.Supp. 383 (D. Mass. 1964), 239 F.Supp. 528 (D. Mass. 1965), aff'd in relevant part sub nom., World Airways, Inc. v. Northeast Airlines, Inc. 349 F.2d 1007 (1 Cir 1965), cert. denied, 382 U.S. 984 (1966). 9, 16, 19, 31, 34

Pacific Northern Airlines v. Alaska Airlines, 80 F.Supp. 592 (D. Alaska 1948). 16

Pan American Airways, Inc., Aerovias De Guatemala, 4 C.A.B. 403 (1943) 25

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963). 21

Railroad Control of Northeast Airlines, 4 C.A.B. 379 (1943) 25

Spanish International Broadcasting v. FCC, 385 F.2d 615 (D.C. Cir. 1967) 16

Standard Airlines, Inc. v. CAB, 177 F.2d 18 (D.C. Cir. 1949) 34

Supplemental Air Service Proceeding, 44 C.A.B. 396 (1966) 26, 27

Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9 Cir. 1949) 20, 21

Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7 Cir. 1972) 14

Travel Agents Malpractice Action Corps. v. Regal Cultural Society, Inc., 118 N.J. Super. 184, 287 A.2d 4 (1972), cert. denied, 60 N.J. 353, 289 A.2d 789 (1972) 16

UAW v. National Caucus of Labor Committees, 525 F.2d 323 (2 Cir. 1975) 11, 13

Weilbacher v. J.H. Winchester & Co., 197 F.2d 303 (2 Cir. 1952) 13, 14

Weit v. Cont. Ill. Nat. Bank & Trust Co. of Chicago, 535 F.2d 1010 (7 Cir. 1976) 11

United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir.), cert. denied, 340 U.S. 827 (1950) 37

United States v. Beckerman, 516 F.2d 905 2 Cir. 1975) 13, 14

Statutes

28 U.S.C. 1291 15
49 U.S.C. 1371(a) . . . . . passim
49 U.S.C. 1374 24
49 U.S.C. 1378 . . . . . 23, 39
49 U.S.C. 1383 25
49 U.S.C. 1482(a) 8, 34
49 U.S.C. 1487(a) . . . . . passim
49 U.S.C. 1486(e) 37

Regulations

CAB Regulations

Part 207, 14 C.F.R. 207. 7

Part 296, 14 C.F.R. 296. 24

Part 302, 14 C.F.R. 302. . . . . 29, 30, 33

Part 305, 14 C.F.R. 305. 32

Part 371, __ C.F.R. __ */ 7, 22, 28, 36

Part 378, 14 C.F.R. 378. . . . . 7, 22, 26, 36

Part 385, 14 C.F.R. 385. . . . . 19, 37

41 Fed. Reg. 37763, 37768 (Sept. 8, 1976). . . 28

Treatises

3 Davis, Admin. Law § 19.01 (1958 ed.) 18

9 Moore, Federal Practice ¶ 110.10 (3d ed. 1973). 11

Miscellaneous

Kuoni Travel Limited (Switzerland) Order 77-2-53. 26

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*/ Part 371 ("Advance Booking Charters") was adopted on September 1, 1976 (Reg. SPR-110) and therefore does not appear in the most recent edition of the Code of Federal Regulations (revised as of January 1, 1976). Part 371 is reprinted in the Joint Appendix, pp. 74-75.

STATEMENT OF THE ISSUES

Plaintiffs - appellees accept the Travellers appellants' statement of issues.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATH-FINDER CORPORATION and UNITOURS, Plaintiffs-Appellees, -against- TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL, Defendants-Appellants.	Appeal No. 77-7134

BRIEF OF PLAINTIFFS-APPELLEES

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Defendants appeal from a March 10, 1977 decision and order of the United States District Court for the Southern District of New York (Hon. Charles E. Stewart, Jr.)[1/] which

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1/ App. 97-102. All references designated "App." are to the Appendix filed herein by defendant TWA. All references designated "R.-" are to the Record in the Court below as certified and transmitted to this Court.

denied their motions to dismiss plaintiffs' complaint. These motions were principally predicated on the contention that primary jurisdiction over that complaint was in the Civil Aeronautics Board ("CAB").[2/] The motions also sought dismissal on other grounds, but the Court deferred ruling thereon until further development of the facts underlying the complaint.

When defendants moved, in this Court, for a stay of proceedings in the court below pending the outcome of these appeals, plaintiffs cross-moved to dismiss the appeals because of lack of jurisdiction in this Court. On March 29, 1977, a motions panel of this Court (Mansfield, Gurfein and Newman, JJ.) granted defendants' stay applications; it also ordered these appeals expedited before this panel. Additionally, as to plaintiffs' Motion to Dismiss the appeals, the motions panel expressly deferred decision to this panel at the time of argument on the merits. That motion is still pending before this Court.

2/ TWA's Motion to Dismiss, with exhibits attached, is at App. 16-96. The Travellers' Motion to Dismiss is at R. 12. Plaintiffs' opposition is at R. 13-15.

Proceedings Below

On February 24, 1977 plaintiffs, an association of charter and charter tour operators and five individual tour operators, filed their complaint in the United States District Court for the Southern District of New York seeking injunctive relief pursuant to Section 1007(a) of the Federal Aviation Act of 1958 ("Act"), 49 U.S.C. 1487(a), on the grounds that defendants have violated and are continuing to violate Section 401(a) of that Act, 49 U.S.C. 1371(a).[3/] Plaintiffs also moved, by Order to Show Cause, to expedite discovery of defendants in aid of their complaint. As aforestated, defendants counter-moved for a dismissal of that complaint.

After hearing in the court below, and intervention by the CAB as amicus disclaiming primary jurisdiction,[4/] on March 10, 1977 the district judge denied defendants' motions and directed expedited discovery. Shortly thereafter, defendants moved for rehearing and reconsideration of their motions or, in the alternative, a stay pending their appeals.[5/]

3/ App. 5-16.

4/ R. 18, 20.

5/ R. 21-22. Plaintiffs' opposition thereto is found at R. 26-27.

On March 23, 1977 Judge Stewart issued another opinion and order[6] adhering to his original decision and denying the requested stay.

Defendants promptly filed Notices of Appeal from both decisions below[7] and moved in this Court for a stay of proceedings below pending those appeals. In response, plaintiffs cross-moved to dismiss the appeals on jurisdictional grounds.

The Facts

On October 14, 1976, TWA and Travellers Air Services, Inc. ("TAS") filed with the CAB's Bureau of Operating Rights a "prospectus" relating to Advance Booking Charters ("ABC's") and Inclusive Tour Charters ("ITC's"). Destined for England and Western Europe, these charters and tours are scheduled to commence on May 1, 1977 and continue through the summer and fall of this year.

Under the CAB Economic Regulations (Parts 371 and 378),[8] charter tour prospectuses contain only certain contracts, surety and depository agreements, and sample

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6/ App. 106-108.

7/ App. 109-115

8/ App. 74-96.

advertising brochures. A CAB staff unit, the Bureau of Operating Rights, routinely reviews prospectuses to insure compliance with the consumer protection provisions of the Regulations and, if such compliance is found, does nothing further. Unless the Bureau raises objection to the filing, the tour or charter operator may start selling the program to the general public fifteen days after such filing. No notice of such filings is published in the Federal Register; no notice was given to any plaintiff herein.

In the case of the TWA/TAS filing, the CAB staff unit required certain changes in the prospectus. Thereafter TAS' counsel telephoned a middle-level Bureau employee to confirm that the advertising of the program could commence. Counsel's ex parte letter,[9/] confirming that telephone conversation, is the only piece of paper recording any CAB action. The 5-Member Civil Aeronautics Board has never passed on the TWA/Travellers charter program.

Soon after TWA and TAS' advertising commenced, USTOA wrote a letter addressed to a TWA staff vice president,[10/]

9/ Appendix D to plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss. R. 15.

10/ Appendix A, Id.

with a carbon copy being sent to the CAB. USTOA has never filed any pleading with the CAB concerning the TWA/Travellers charters.[11/]

In line with its letter to TWA, USTOA began an investigation tc ascertain the relationship between defendants TWA and TAS. It soon became apparent that TAS was inextricably intertwined with the other Travellers defendants -- some of which had long-standing relationships with TWA -- and that TAS was prima facie incapable of independently undertaking the heavy financial requirements of the so-called TWA/TAS Spring and Summer 1977 charter program.[12/] It became equally apparent that because of their economic dependency on TWA's charter and tour activities, these Travellers defendants -- and certainly defendant TAS -- could not possess the requisite independence of TWA mandated by the Federal Aviation Act and CAB regulations.

11/ While appellants asserted that USTOA's mailing of the carbon copy of the letter to the CAB constituted the filing of an informal complaint, over which the CAB has assumed jurisdiction, the CAB stated in the District Court that its investigation "is not based solely on any complaint by plaintiffs" and that "[t]he issues being investigated by the CAB include, but are not limited to, those contained in the complaint herein and the continuation of this action would not interfere with the CAB's investigation." See Affidavit of Paul Bessel, CAB Senior Attorney, in support of CAB Motion to Intervene as Amicus Curiae. R. 20. See also infra, at pages 32-33.

12/ See, Galligan Affidavit in Opposition to Motion to Dismiss, R. 13.

Under Section 401(a) of the Act no air carrier may engage in air transportation without a CAB certificate, unless the CAB exempts it from the certification requirement. And a direct air carrier, such as TWA, although certificated, may not operate ABC or ITC charters. Economic Regs. 371.2, 378.2(d); App. 74, 87. Moreover, TWA may lease its aircraft only to a United States citizen indirect air carrier that is exempt.[13/] TAS purports to be exempt by virtue of the CAB's charter regulations. Under those rules, however, a United States citizen is eligible for an exemption only if it is an "independent principal" and not an "agent" for a direct air carrier. Economic Regs. 371.10(a), 378.2(b)(6); App. 76, 87. In fact, TAS is not "independent" but, rather is controlled by TWA and therefore does not qualify for an exemption. By reason thereof TAS and TWA (together with TAS' Traveller affiliates) are operating in violation of § 401(a) of the Act.

Because of this, USTOA decided to file a complaint under Section 1007(a) of the Act. That provision gives private parties the right to seek a district court injunction

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13/ Or to a foreign indirect air carrier having a permit [CAB Economic Regulations §§ 207.11(b)(8) and 10, and 207.11(c)(6) and (8); App. 60-61,]. TAS does not purport to be foreign-owned or -controlled and, in any event, does not possess a foreign air carrier permit.

to halt Section 401(a) violations. The question before the district court is whether TWA controls TAS. If so, as Judge Stewart found, "the current charter arrangements between TWA and the other defendants [are] violative of [Section 401(a) of the Act,] 49 U.S.C. § 1371(a)." App. 107.

ARGUMENT

Summary of Argument

This is a case where only the district court can provide effective relief. Appellants' 181-flight charter program, which is scheduled to begin next month, is not the subject of any CAB proceeding. No CAB proceeding can be instituted and finished before these 1977 charters are completed. The CAB is administratively powerless to do more than issue an after-the-fact order to cease and desist (Federal Aviation Act § 1002, 49 U.S.C. 1482). By arguing that this matter belongs before the CAB, appellants expect to escape any meaningful sanction whatever. Unless the district court grants an injunction, appellants will conduct their illegal charters with impunity.

There is no reason that a federal court should refuse to hear this case on the merits. The doctrines of primary jurisdiction and exhaustion of administrative remedies

do not apply to this suit under Section 1007(a) of the Act, 49 U.S.C. 1487(a). That statute expressly authorizes private parties to seek injunctive relief in a district court for violations of Section 401(a) of the Act, 49 U.S.C. 1371(a). "* * * Congress intended to allow even private parties to enforce that Section of the Act without prior reference to the Board." See CAB v. Aeromatic Travel Corp., 489 F.2d 251, 254 n. 8 (2 Cir. 1974) (emphasis supplied). See also CAB v. Modern Air Transport, Inc., 179 F.2d 622 (2 Cir. 1950).[14/]

These authorities have special force where, as here, the CAB decides to participate in the proceeding and to disclaim any primary jurisdiction. To refer this case to the CAB against that agency's wish would be a pointless formalism.

Apart from the merits, no appeal is properly before this Court. The district court's orders, which appellants attack, are interlocutory. Not being final, they are not appealable under any theory of law, including that enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

14/ To the same effect, see World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1 Cir. 1965), cert. denied, 382 U.S. 984 (1966); Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9 Cir. 1972).

POINT I

THE ORDERS BELOW ARE NON-APPEALABLE

The district court's orders of March 15 and 23, 1977 did nothing more than overrule appellants' argument that the CAB had primary jurisdiction over plaintiffs' complaint and deny appellants' motions, based on that argument, to dismiss plaintiffs' complaint. The court below specifically deferred ruling on appellants' other motions to dismiss, either as to certain appellants or because of a claimed failure of plaintiffs to state a cause of action, until the record in the case is more fully developed.[15/] Accordingly, the orders below are clearly interlocutory in nature and non-appealable to this Court under 28 U.S.C. 1291 unless within the "small class" of exceptions established by the rule of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-547 (1949). Appellants argue here[16/] that the orders in question are within the ambit of the Cohen doctrine and plaintiffs contend they are not.

This Court has recently held that "[t]o be appealable under Cohen an order must present 'a serious and

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15/ App. 100-101.

16/ TAS Br. 12-14. TWA Br. 6. Indeed, without otherwise addressing the issue, TWA flat-out asserts a claim of appealability as a matter of right.

unsettled question,' which is 'too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated' because awaiting final judgment would preclude effective review where rights asserted would be irreparably lost." UAW v. National Caucus of Labor Committees, 525 F.2d 323, 325 (2d Cir. 1975). Moreover, it has also held, in that and many other cases, "that Cohen may not be abused by indiscriminate extension; that this limited exception 'must be kept within narrow bounds.'" Id., and cases cited at 325. See also Weit v. Cont. Ill. Nat. Bank & Trust Co. of Chicago, 535 F.2d 1010, 1014-1015 (7 Cir. 1976), citing 9 Moore, Federal Practice, ¶ 110.10 at 133 (3d ed. 1973) for the proposition that "the Cohen rule would appear to require the presence of a question of general importance beyond the immediate concern of the particular litigants * * *."

Appellants rely on this Court's decisions in C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974) and Local 771, I.A.T.S.E., A.F.L.-C.I.O. v. RKO General, Inc., WOR Division, ___F.2d ___ (2d Cir. Slip Op. March 3, 1977, Docket No. 76-7430), as authority for their claims in this case that their present appeal to this Court is one "of right." We submit that appellants' reliance is unfounded and plainly misreads this Court's holdings in both cases.

In Aeromatic, the District Judge stayed further proceedings in litigation brought by the CAB itself in the district court -- its own choice of forum -- and, invoking the primary jurisdiction doctrine, referred the Board back to itself for initial determination of the very question it was seeking to litigate. In accepting jurisdiction, but not without dissent on that very issue, this Court concluded that under the facts of that case, "the issue of primary jurisdiction was vital to the CAB efforts to secure speedy enforcement of the Federal Aviation Act and the Board's regulations, and * * * too important to be deferred until the entire case is decided." 489 F.2d at 253. It did not hold, however, as appellants seemingly assert, that every interlocutory order involving the issue of primary jurisdiction is per se appealable under the Cohen rule.

Similarly, in Local 771, etc. v. RKO General, Inc., supra, this Court found that the District Court's order involved an important but collateral question of national labor policy. And the District Court's order also threatened, irretrievably, to deprive appellant of a valuable right, gained through collective bargaining under that policy, not to have to litigate through to final judgment before seeking vindication of that right.

Clearly, the holdings in both cases relied on by appellants are readily distinguishable from, and inapplicable

to, the case at bar. Here, appellants' appeals are truly the "run-of-the-mill attempted piecemeal appeal from a denial of a motion to dismiss, which is not appealable for the reason that appellant may prevail at trial or ultimately be vindicated upon appeal from an adverse final judgment." Local 771, supra, Slip Op. at 2171.

Defendants TAS and Travellers International Tour Operators, Inc. ("TITO") also rely on Local 438 Construction & General Laborers' Union v. Curry, 371 U.S. 542 (1963), Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963), Weilbacher v. J. H. Winchester & Co., 197 F.2d 303 (2 Cir. 1952) and United States v. Beckerman, 516 F.2d 905 (2 Cir. 1975) to support a contention that the Cohen rule exception to the requirement of finality of judgments as a predicate for appealability is "lengthening." Wholly aside from the express injunction of this and other courts and authorities that the Cohen exception "must be kept within narrow bounds," see e.g., UAW v. National Caucus of Labor Committees, supra, the cases relied on are clearly distinguishable.

Local 438, supra involved the issuance of an injunction by a state court in a labor dispute which Congress had mandated was within the exclusive jurisdiction of the NLRB. Mercantile Nat'l Bank involved the preemption by a

federal banking statute of the venue wherein a National Bank might be sued. But see Mr. Justice Harlan's opinions in both of these cases seriously questioning "appealability". Weilbacher, with Judge Frank dissenting on the question of appealability, dealt with the question of the vacating of a final judgment, entered on the stipulation of the parties, from which one party sought to be, and was, relieved. And, Beckerman concerned the determination of whether the constitutional safeguard against double jeopardy precluded retrial of the defendant after a mistrial had been declared.

In each instance cited, the courts found that a valuable right, collateral to the issues of the main case, could be irretrievably lost to appellant absent early intervention.

In the instant case, however, -- and especially in light of the specific provisions of Section 1007(a) granting rights to plaintiffs -- defendants have no "claim of right * * * too important to be denied review * * *," Cohen, supra, which is threatened by the decision below with irretrievable loss. Indeed, in Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7 Cir. 1972) the Court expressly held, in the face of a Cohen rule argument, that denial of a motion for referral to an administrative agency

under the doctrine of primary jurisdiction was not an appealable order under 28 U.S.C. 1291. Clearly, had the court below ruled in favor of primary jurisdiction plaintiffs might have had a valid basis for appeal at this juncture, cf. Hines v. D'Artois, 531 F.2d 726, 730-731, (5 Cir. 1976), but in the present posture of the litigation defendants do not.

II. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF PRIMARY JURISDICTION

A. The Relevant Authorities Allow The Federal Courts To Grant An Injunction Under Section 1007(a) Without Prior Resort To The CAB

Contrary to defendants' opposition, the District Court correctly refused to invoke the doctrine of primary jurisdiction. That doctrine has limited relevance to a lawsuit, like this one, which is predicated upon Section 1007(a) of the Act, 49 U.S.C. 1487(a). For Section 1007(a) gives any "party in interest" [17/] the right to petition the District Court for injunctive relief against a violation of Section 401(a) of the Act, 49 U.S.C. 1371(a):

> If any person violates * * * section 1371(a) of this title [§ 401(a) of the Act], any party in interest may apply to the district court of the United

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17/ Because they compete with defendants, plaintiffs are unquestionably parties in interest within the meaning of Section 1007(a) of the Act. Northeast Airlines, Inc. v. World Airways, Inc., 237 F.Supp. 383 (D. Mass. 1964), 239 F.Supp. 528 (D. Mass. 1965), aff'd in relevant part, sub nom., World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1 Cir. 1965), cert. denied, 382 U.S. 984 (1966); Pacific Northern Airlines v. Alaska Airlines, 80 F.Supp. 592 (D. Alaska 1948); Flying Tiger Line v. Atchison, Topeka & Santa Fe Ry. Co., 75 F.Supp. 188 (S.D. Cal. 1947); Travel Agents Malpractice Action Corps. v. Regal Cultural Society, Inc., 118 N.J. Super. 184, 287 A.2d 4 (1972), cert. denied, 60 N.J. 353, 289 A.2d 798 (1972); cf. Spanish International Broadcasting Co. v. FCC, 385 F.2d 615 (D.C. Cir. 1967); Hunt Oil Co. v. FPC, 334 F.2d 474 (5 Cir. 1964); American Communications Association v. United States, 298 F.2d 648 (2 Cir. (1962).

> States, * * * for the enforcement of such provision * * * and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction * * *.

This Circuit has ruled that Section 1007(a)'s call for judicial action cannot be easily aborted by primary jurisdiction claims. CAB v. Modern Air Transport, Inc., 179 F.2d 622 (2 Cir. 1950). There the Court refused to apply the "self-denying doctrine" of primary jurisdiction to a Section 1007(a) suit seeking to halt Section 401(a) violations. As the Court recognized, judges have used the primary jurisdiction doctrine "as a ground for refusing to decide the difficult issues of reasonableness of a rate or fairness of a regulation which fall within the area of special competence of a particular administrative agency * * *." But the "doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule but a violation of such rate or rule." 179 F.2d at 624.

Applying that precedent, among others, the District Court correctly concluded that the primary jurisdiction doctrine is inapplicable to this case since "the Court is being asked to determine the existence of a violation of Section [1007(a) of the Act, 49 U.S.C.] 1371(a) * * *, and not the reasonableness of any rate." 18/

18/ App. 98.

Citing Modern with approval, this Circuit has again recently rejected arguments that primary jurisdiction bars a suit under Section 1007(a). CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2 Cir. 1974).

In both Second Circuit cases, the CAB was plaintiff. But although the Modern Court had expressed "no opinion" about a Section 1007 suit by a private party (179 F.2d at 626), the Aeromatic Court swept this reservation away. For the Court observed that Congress intended to allow private parties, as well as the CAB, to enjoin violations of Section 401(a) "without prior reference to the Board." 489 F.2d at 254 n. 8.

In any event, the CAB's intervention in this proceeding negates any rationale for invoking primary jurisdiction. "The principal reason behind the [primary jurisdiction] doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts." 3 Davis, Admin. Law § 19.01 (1958 Ed.). In this case, as the District Court noted (App. 99-100), the CAB's Amicus Memorandum declares "it is the CAB's view that * * * the doctrine of primary jurisdiction is inapplicable and no reference of this matter to the CAB is necessary."[19/] Plainly, the doctrine should not

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19/ R. 18.

be applied where the Board has considered the matter and proclaimed that no reason exists for initial agency determination.

Trying to shrug off the CAB Bureau of Enforcement's participation in this case, appellant TAS (Br., p. 22) argues that the CAB is not "the moving party" and the Bureau's submission is "merely an expression of opinion." But the CAB has officially delegated authority to the Bureau, as the CAB's "agent," to enforce the Act in court proceedings [14 C.F.R. § 385.22(d)]. And, as this Circuit has recognized, the CAB's appearance as amicus in Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9 Cir. 1972), was one of the factors that strengthened the Ninth Circuit's decision to grant a Section 1007(a) injunction to a private party.[20/] CAB v. Aeromatic, supra, 489 F.2d at 254 n. 8.

Other Circuits have also recognized that Section 1007(a) of the Act empowers the District Court to grant privately-sought injunctions without prior agency reference. World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1 Cir. 1965), cert. denied, 382 U.S. 984 (1966); Monarch Travel

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20/ In Monarch, as here, the CAB attorneys who appeared were members of the Bureau of Enforcement staff.

Services, Inc. v. Associated Cultural Clubs, Inc., supra. In World, where the CAB did not appear as a party, the First Circuit granted an injunction at the behest of a private party. Indeed, the CAB's official position in this proceeding is that "[a] party in interest is permitted to seek judicial enforcement of [Section 1007(a) of the Act,] 49 U.S.C. § 1371(a), as plaintiffs are doing here, regardless of whether the CAB is a party to the action * * *."[21/]

B. The Appellants' Authorities Are Inapposite

In opposition to these modern precedents, appellants rely primarily on two antique decisions: Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9 Cir. 1949) and American Airlines, Inc. v. Standard Airlines, Inc., 80 F.Supp. 135 (S.D.N.Y. 1948). Appellants' authorities are both clearly distinguishable from the instant case.[22/] One of

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21/ R. 18 at p. 2.

22/ Both Trans-Pacific and Standard involved attempts to enjoin so-called "non-scheduled"--or "irregular"--airlines from engaging in scheduled air transportation. Seeking to create a competitive spur for the entrenched "scheduled" airlines, the CAB had created the non-scheduled carriers and sought to limit the latter to performing "irregular"--not "scheduled"--operations. The non-scheduled carriers constantly tried to circumvent this limitation in order to poach upon the scheduled airlines' operations. In this regulatory context, "irregular" became a term of art. The CAB was called upon to intepret its regulation and, as a matter of policy, to decide where it wished to draw the line between the operations of the airline classes.

those decisions recognized that "the courts will proceed" where, as here, "the application of the administrative regulations is clear and no special familiarity with the complicated factual situations peculiar to the field is imposed * * *" Trans-Pacific, supra, 174 F.2d at 66. The Standard case dealt with "a highly technical [issue], calling for expert knowledge of the industry." 80 F.Supp. at 139. Moreover, the CAB has taken great pains to question the Standard decision's correctness. Nats Air. Transp. Serv., Enf. Proceeding, 10 C.A.B. 57, 60, n. 6 (1949).

Appellants also attempt to support their primary jurisdiction argument by citing antitrust decisions.[23/] But this Circuit has already noted that several of those cited decisions are "not relevant" to a Section 1007(a) case, which does "not deal with an alleged antitrust violation that

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23/ Nader v. Air Transport Ass'n of America, et al., ___ F.Supp. ___, 1977 CCH Trade Cases ¶ 61,280 (D.D.C. 76-1180, Feb. 9, 1977); Foremost Int'l. Tours, Inc. v. Qantas Airways Ltd., 525 F.2d 281 (9 Cir. 1975), cert. denied, 45 U.S.L.W. 3249 (Oct. 5, 1976); Hughes Tool Co. v. TWA, 409 U.S. 363 (1973); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); Far East Conference v. United States, 342 U.S. 570 (1952). In the last-cited decision, the administrative agency (the Federal Maritime Board) joined in the motion requesting that the complaint be dismissed on the ground of primary jurisdiction. 342 U.S. at 572.

could arguably be remedied or exempted by the Board." CAB v. Aeromatic Travel Corp., supra, 489 F.2d at 254, n. 10. For the same reason, appellants' remaining antitrust citations are inapposite.

Relying on these antitrust cases, TWA asserts that District Court action in this proceeding will interfere with "uniformity and consistency" in aviation regulation (TWA Br., pp. 15-17). TWA's fears are unfounded. The CAB itself has proclaimed its willingness for judicial enforcement in cases, like this one, touching upon charter operations. Both the ABC regulation (Section 371.4) and the ITC regulation (Section 378.31) provide in identical language that:

> In the case of any violation of the provisions of the Act, or of this part, or any other rule, regulation, or order issued under the Act, the violator may be subject to a proceeding pursuant to Sections 1002 and 1007 of the Act before the Board or a U.S. District Court, as the case may be, to compel compliance therewith, to civil penalties pursuant to the provisions of Section 901(a) of the Act, or to criminal penalties pursuant to the provisions of Section 902 of the Act, or other lawful sanctions. (Emphasis supplied.) (Text of regulations is reproduced in App. 75, 94-95.)

Undoubtedly, this reflects the CAB's preoccupation with regulating the airline industry rather than the charter tour

operator industry, so that the CAB "lacks the expertise and the incentive (--after all it is not its industry--) to act on an inter-industry problem." See Foremost Int'l. Tours, Inc. v. Qantas Airways Ltd., 525 F.2d 281, 285 (9 Cir. 1975) (rejecting primary jurisdiction claim) (emphasis in original), cert. denied, 45 U.S.L.W. 3249 (Oct. 5, 1976).

TWA gains no support from the Ninth Circuit's resolution of a dispute between two air freight forwarders. DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9 Cir. 1975). There, the defendant in the district court had initiated a formal CAB proceeding asking for approval of its control relationships and a license. "These C.A.B. proceedings continued during the pendency of [the] litigation before the district court." 522 F.2d at 983. In contrast, here TWA and Travellers have not filed any formal proceeding or asked the CAB to approve their control relationship. Indeed, the Federal Aviation Act requires such requests to be filed before the airline acquires control, not afterwards. Act Section 408, 49 U.S.C. 1378. Hence, there is no risk here that the agency and the court will issue "conflicting decisions." 522 F.2d at 985.

TWA also suggests (Br., p. 22) that, under DHL, the violation of a CAB regulation cannot be grounds for a Section 1007 suit in District Court. But --unlike the air freight

forwarding regulation involved in DHL (14 C.F.R., Part 296)--the CAB charter regulations specify on their face that "a U.S. District Court" may enjoin "any violation of this * * * regulation." (See quote, page 22, supra.) In any event, this Court has endorsed District Court action where "the issue is * * * a violation of [a] * * * rule." CAB v. Modern Air Transport, supra, 179 F.2d at 624 ("* * * courts have original jurisdiction to interpret * * * rules * * * where the issue is one of violation, rather than reasonableness").[24/]

24/ Appellant TWA's additional citation (Br., p. 16-17) of Danna v. Air France, 463 F.2d 407 (2 Cir. 1972) is inapposite. That case involved an alleged violation of the Federal Aviation Act's prohibition against unreasonable and discriminatory rates--Federal Aviation Act Section 404, 49 U.S.C. 1374. This suit to enjoin a violation of Federal Aviation Act Section 401(a), 49 U.S.C. 1371(a), differs from Danna in three respects. First, in the words of Danna, it does not involve "claims that filed tariffs are either unreasonable in amount or unduly discriminatory in effect [which] are questions that in the first instance must be determined by the agency with which the tariffs are filed." 463 F.2d at 409. Second, Section 1007(a) of the Act expressly creates a private right to sue in District Court for violations of Section 401(a) of the Act, but not for violations of Section 404 of the Act. Third, this Court has said that the doctrine of primary jurisdiction "is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule [as in Danna], but [as here] a violation of such rate or rule." CAB v. Modern Air Transport, Inc., 179 F.2d 622, 624 (2 Cir. 1950).

Also irrelevant is TAS' citation (Br., p. 22) of NLRB v. Standard Oil Co., 138 F.2d 885 (2 Cir. 1943), where the agency successfully obtained judicial enforcement of a decree issued after agency proceedings. No question of primary jurisdiction was involved.

C. The Issue Here Is One Which Courts Are Competent To Decide

Finally, appellants' suggest that the CAB's expertise is essential here. For that reason, they declare in conclusory terms that this case confronts the District Court with a "gargantuan task" (TAS Br., p. 20). In fact, however, the issue is simple--is the Travellers group an "independent principal," as CAB regulations require (Complaint, ¶ 18; App. 18), or is it controlled by TWA (Id. ¶¶ 22-24; App. 12-13). As the District Court recognized, if the Travellers group is controlled by TWA that would "make the current charter arrangements between TWA and the other defendants violative of [Section 401(a),] 49 U.S.C. § 1371(a)" (App. 107).

Resolving the "control" issue does not require specialized knowledge. The Act itself proclaims that "whenever reference is made to control, it is immaterial whether such control is direct or indirect." (Section 413 of the Act, 49 U.S.C. 1383.) And the CAB has taken pains to disavow that control has any "technical meaning apart from * * * ordinary usage."[25/] Plainly,

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25/ Railroad Control of Northeast Airlines, 4 C.A.B. 379, 381 (1943) ("[T]here is no legal or technical meaning of control apart from that accorded the term in ordinary usage * * *"). In Pan American Airways, Inc., Aerovias De Guatemala, 4 C.A.B. 403, 404-405 (1943), a case cited by the Travellers defendants, the CAB said: "The word 'control' * * * is not a word of art, nor has it any technical signification. Therefore, its everyday meaning must be accorded it" (footnotes omitted).

the District Court can determine whether the alleged "control" exists.

Seeking to obfuscate, appellants argue incorrectly that the CAB regulations must be "interpreted." But, contrary to TWA's (Br., pp. 8-9, 12-13) and TAS' (Br., pp. 23-24) contentions, there is no doubt that any TWA control over Travellers would violate CAB regulations. In 1966, when the ITC regulations began, the CAB ruled that "control relationships between air carriers and tour operators are prohibited by Section 408 of the Act in the absence of Board approval (see Sec. 378.3)." Supplemental Air Service Proceeding, 44 C.A.B. 396, 400 n. 12 (1966). Over the years, the CAB has adhered to a uniform "policy of precluding affiliation relationships between charter tour organizers and U.S. direct air carriers * * *."[26/] In the fact of these uniform prohibitions against airline control over tour operators, no "interpretation" is needed.

Another red herring is TWA's argument (Br., pp. 7-8) that this case presents the question "who" can operate North Atlantic charters--and "how." But the answers to those questions

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26/ See Kuoni Travel Limited (Switzerland), CAB Order 77-2-53 (Feb. 14, 1977), which is attached as Exhibit I to Beckman's March 24 affidavit in support of defendant Travellers' motion for rehearing, reconsideration, and stay. R. 21. See also Littell's March 19 affidavit (¶ 5) in support of opposition to motion for rehearing, reconsideration and stay. R. 26.

is cut and dried. Under CAB regulations, any independent tour operator (i.e., not controlled by an airline) can operate North Atlantic charters so long as it complies with the regulations. There are 200 to 300 tour operators in business now. But, except for leasing aircraft to independent tour operators, direct airlines (like TWA) may not--directly or indirectly--operate any of the types of charters involved here.[27/]

Next, TWA seeks to suggest (Br., pp. 10-12) that these CAB regulations should apply primarily to control of tour operators by supplemental airlines, rather than by scheduled airlines (like TWA). That is pure nonsense. When the CAB adopted the ITC regulation, it clearly rejected TWA's position:

> As originally adopted, part 378 would preclude supplemental air carriers from acting as tour operators. We are expanding this provision to cover all direct air carriers (see sec. 378.2(d)). Supplemental Air Service Proceeding, 44 C.A.B. 396, 400 n. 12 (1966). [Emphasis supplied.]

27/ In a gratuitous aside, TWA suggests (Br., pp. 7-8) that appellants brought this lawsuit in order to lessen competition. In fact, with or without the TWA/Travellers program, plaintiffs will continue to compete with scores of independent tour operators across the North Atlantic. Elimination of the TWA/Travellers program will not noticeably reduce competition.

Similarly, TAS' statement that it is exempt under the regulations begs the question. TAS is exempt only if it is an "independent principal" and not an "agent" for TWA; i.e., it is exempt only if it is not controlled by TWA.

More recently, in adopting the ABC charter regulations, the CAB rejected TWA's request "that direct air carriers should be authorized to sell ABC's directly to the public." 41 Fed. Reg. 37763, 37768 (Sept. 8, 1976). Plaintiffs' complaint here is that TWA has violated the "independent principal" regulations --Sections 371.10(a) and 378.2(b)(6); App. 76, 87--which spell out these CAB policy decisions.[28/]

Neither the CAB nor the District Court share appellants' misconceptions about this case. As Judge Stewart stated below:

> [T]he CAB has appeared as amicus and told me that this case does not present issues which they feel are so complex or intimately related to agency policies that I should apply the doctrine of primary jurisdiction and defer to them the initial determination of this case (App. 99-100).

Clearly, the Court was amply justified in concluding that it is not "necessary or appropriate * * * to defer to the CAB" (App. 107).

28/ TWA's argument (Br., p. 12) that it is allowed to advertise TGC charters in mass media is beside the point. The complaint simply identifies TWA's enormously expensive T.V. and print advertising of TAS' ITC and ABC charter programs as one indicia that TWA controls the "shell" tour operator, which has few funds of its own. TWA's argument that it does not in fact control TAS is directed at the motion to dismiss for failure to state a claim--which is still pending before the District Court (App. 100-101).

III. THIS COURT ACTION IS NOT BARRED BY THE FILING OF AN INFORMAL COMPLAINT BEFORE THE CAB--OR BY THAT AGENCY'S INVESTIGATION OF BROADER VIOLATIONS

A. The Existence of An Informal Complaint Does Not Constitute An "Election Of Remedies"

There is no merit to appellants' argument that this Court should defer to the CAB because that agency has received an "informal" complaint. To begin, USTOA has never filed any formal action before the CAB. The so-called "informal" complaint consists of USTOA's November 8, 1976 letter to TWA, a copy of which was sent to the CAB.[29/] Under the CAB's rules [14 C.F.R. § 302.200(b)] such "informal" complaints have little stature, usually being disposed of "by correspondence or conference" (Id.).

Arguing that the CAB has "taken jurisdiction at the request of USTOA" (TAS Br., pp. 15-16), the appellants erroneously imply that an informal complaint initiates some sort of CAB proceeding. That is not the case--even for a formal complaint. CAB regulations state unequivocably that "[t]he submission of a formal complaint by a person other than an enforcement attorney * * * shall not in itself result in

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29/ USTOA's letter to TWA appears as Appendix A to plaintiffs' memorandum in the District Court in opposition to motions to dismiss and for other relief. R. 15.

the institution of a formal economic enforcement proceeding and a hearing with respect to the complaint unless and until the Director of the Bureau of Enforcement dockets a petition for enforcement * * *" (14 C.F.R. § 302.201). Obviously, the Bureau Director is free to let USTOA's "informal" complaint languish in limbo forever.

Although TAS argues (Br., p. 16) that USTOA has made an election of remedies, appellant cites no authorities. Nor could it. Indeed, a recent decision is not only squarely on point; it is flatly contrary to Travellers' position. Alaska Int'l. Air, Inc. v. Southern Air Transport, ___ F.Supp. ___ (S.D. Fla. Case No. 76-2088-Civ-NCR, decided Feb. 3, 1977).

That action, like this one, was a suit brought under Section 1007(a) of the Federal Aviation Act by a private "party in interest" who alleged that defendant airline had violated Section 401(a) of the Act. There, as here, defendant sought to stay the proceeding (and to block discovery) on the ground that plaintiff's charges were the subject of its third party complaint pending before the CAB.

Denying the motion to stay, the Court rejected the contention which TAS repeats here:

> Defendant's motion to stay is based on the grounds that the charges made in this case are the subject of plaintiff's third

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> party complaint presently pending before the C.A.B., and this case is therefore premature. However, § 1487(a) does not require the exhaustion of administrative remedies before the invocation of court action. World Airways Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1 Cir. 1965) * * *. Alaska Int'l. Air, Inc. v. Southern Air Transport, supra, Order attached as Appendix B to plaintiffs' memorandum in the District Court in opposition to motions to dismiss and for other relief. R. 14.

Those courts which have passed on this question have reached the same result. The First Circuit has plainly ruled that "[n]othing in [Section 1007(a) of the Act, 49 U.S.C.] § 1487(a) requires the exhaustion of administrative remedies before the invocation of court action." World Airways, Inc. v. Northeast Airlines, supra, 349 F.2d at 1010. In Flying Tiger Line v. Atchison, Topeka & Santa Fe Ry. Co., 75 F.Supp. 188, 195 (S.D. Cal. 1947), the Court referred to Section 1007(a)'s authorization for an agency or court action--and concluded:

> * * * I see nothing in the Act which would prevent the taking of both procedures at the same time if a person thought it necessary.

Appellants' arguments to the contrary are plainly wrong.

B. The CAB's On-Going Investigation Does Not Oust The District Court Of Jurisdiction

Citing the Bureau of Enforcement's investigation of their illegalities, appellants contend the Federal courts should decline to proceed with appellees' action. Appellants thus seek to use the consequences of their illegal conduct as a shield to ward off civil litigation. Plainly appellants should not be allowed to hide behind the Bureau's investigation.

In the first place, the CAB has belied appellants' contention that the Court should stay its hand in deference to the agency. In its Memorandum As Amicus Curiae (p. 5), the CAB stated unequivocably that "the continuation of this action before this Court will not interfere with the CAB's investigation * * *." 30/

Secondly, the Bureau of Enforcement's investigation is unlikely to produce any relief addressed to plaintiffs' complaint. For one thing, as TAS concedes (Br., p. 3), the Bureau's investigation extends to violations ranging beyond that alleged by plaintiffs. Thus, the Bureau's Part 305

30/ In this Court, the CAB's Memorandum (and Supporting Affidavit) appear as Exhibits 1 and 2 to Appellee's affidavit in support of the pending cross-motion to dismiss appeal and in opposition to defendants' motions for stay pending appeal. See also R. 18, 20.

investigation is not addressed to the Travellers appellants specifically. Instead, it will cover an untold number of "air carriers [including the Travellers appellants], foreign air carriers, and others" (TAS Br., App. A, p. 2). It covers violations of numerous provisions of the Act--but not of Section 401(a), about which appellees complain (Id. at 2-3). If the Bureau ever dockets a formal complaint, it may be directed to illegalities not germane to this case. Moreover, the Bureau may drop its investigation or turn to other, more pressing matters. Appellees' absolute right under Section 1007(a) of the Act to sue for Section 401(a) violations cannot be aborted by the spectre that the CAB staff might someday decide to take action against the Travellers defendants and TWA.

Thirdly, agency action cannot provide effective relief in any event. Although TWA notes (Br., p. 14) that the Director of the CAB's Bureau of Enforcement can docket an enforcement petition now, the Bureau must go through a protracted administrative hearing and await the Admininstrative Law Judge's initial decision and the Board's final decision. (See 14 C.F.R. §§ 302.206-213, 302.27-37.) The strongest remedy the Board can provide administratively--a

cease-and-desist order [Section 1002(c) of the Act, 49 U.S.C. 1482(a)]--will come too late since the illegal charter program will have been completed.[31/] As the First Circuit recognized, these "time consuming enforcement procedures of CAB followed by review in a court of appeals" leave aggrieved parties with an "illusory remedy." World Airways, Inc. v. Northeast Airlines, supra, 349 F.2d at 1010. Only injunctive relief from the District Court can prevent appellants from completing their illegal charter program with impunity.

Next, there is no substance to appellant TAS' due process arguments (TAS Br., pp. 17-18). To be sure, appellants say that it is unfair for them to have to answer to both plaintiffs' complaint and the CAB investigation. But it is not uncommon that a defendant is called upon to defend against the prosecution of its wrong on two fronts. Appellees should not be barred from seeking their sole remedy under the Act because the CAB is investigating this and other wrongs believed to be committed by the appellants. In any event, the fact that discovery is burdensome cannot be a valid means of staying a lawsuit. Here, appellants merely allude to the prospect of duplicative discovery. Indeed, as

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31/ TWA suggests (Br., p. 14) that the CAB's charter rules give the agency power to suspend a tour operator's authority summarily and "without hearing." If the CAB attempted such action, TWA and TAS would be sure to insist that they were entitled to a hearing under the doctrine of Standard Airlines v. CAB, 177 F.2d 18 (D.C. Cir. 1949).

the March 23, 1977 letter from Paul Bessel, Senior Attorney for the CAB's Bureau of Enforcement demonstrates,[32/] the discovery requests of the Board present little or no burden to the Travellers defendants: they are simply failing or refusing to comply.

V. THIS COURT ACTION DOES NOT INTRUDE UPON PAST OR FUTURE CAB DETERMINATIONS

A. The CAB Has Never Made A Determination That TAS Is Free Of TWA Control

Stating that the CAB has "extensively reviewed" the TWA/Travellers program, appellant TAS argues that appellants are "asking the court to review part of the CAB's actions in a non-statutory review proceeding without the CAB being a party" (TAS, Br., pp. 15-16). But appellants clothe the CAB staff unit's routine review of certain charter documents with undue dignity. Appellants thus misstate the role of the CAB staff unit in accepting a filing.

Under the CAB charter regulations, tour operators are required to file only routine documentation--a "prospectus" consisting of the operators' contracts with the airline and passengers, their surety bond and depository agreement, and

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32/ The letter referred to is attached as Exhibit A to the Howard Roy Supplemental Affidavit in Support of Defendants' Motion For Stay of Proceedings Pending Appeal filed in this Court on March 29, 1977.

their proposed advertising (CAB Economic Regs., §§ 371.28 and 378.13; App. 80, 90). The CAB staff reviews these documents in a pro-forma fashion, using a checklist[33/] designed to insure only that consumer protection features are followed.

Under this routine acceptance procedure the staff did not grant TAS any substantive approval of its charter program. If TAS' originally-filed documents had complied with the consumer protection criteria, the staff would have taken no action whatsoever. In that event, the tour operator is automatically free to begin selling its program 15 days after the filings are submitted (Reg., §§ 371.25(a)(1), 378.10; App. 78, 89). In TAS' case, the staff required TAS to correct routine errors and communicated its acceptance of the changes by a routine telephone call.[34/] Certainly this casual staff action

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33/ The Director of the CAB's Bureau of Operating Rights published this checklist as part of the document attached as Appendix E to plaintiffs' memorandum in the District Court in opposition to motions to dismiss and for other relief. R. 15. The checklist is referred to in paragraph "3" of the Director's memorandum (App. E first page); the checklist follows the page headed "Procedures Outlining the Use of Standard Forms."

34/ See letter from TAS' attorney to CAB staff, referring to that telephone call regarding TAS' original 160-flight OTC and ABC program. This letter is reproduced as Appendix D to plaintiffs' memorandum in the District Court in opposition to motions to dismiss and for other relief. R. 15. It is fair to assume that the staff's acceptance of TAS' enlarged program (TAS Br., pp. 15-16, 20) was communicated in similar fashion.

was not subject to a "statutory review proceeding."[35/]

Finally, there is no substance to TAS' contentions (Br., p. 16) that the staff unit accepted its prospectus "with full knowledge of TWA's activities." TAS fails to reveal that two separate CAB staff bureaus are involved. The CAB's Bureau of Operating Rights has independent jurisdiction to "accept or reject" (not approve or disapprove) charter filings [14 C.F.R. § 385.13(ff)]. The Bureau of Enforcement is the agency arm investigating the TWA/Travellers control relationship. In its submission to the Bureau of Operating Rights, TAS' "prospectus" contains only the routine consumer-protection documents, which provide no predicate to determine whether TAS (or the Travellers group) is controlled by TWA. Consequently, the Bureau of Operating Rights' pro-forma acceptance of TAS' prospectus did not constitute a ruling regarding TWA control over TAS.

35/ The telephonic acceptance of TAS' charter filing was not an appealable "order." To be appealed, CAB orders must be written documents since they must contain "findings of facts by the Board * * *." [Section 1006(e) of the Act, 49 U.S.C. 1486(e).] Moreover, the staff unit's action was not appealable because it was not the product of "an evidentiary record." Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912, 916 (D.C. Cir. 1973). Accord, Arrow Airways v. CAB, 182 F.2d 705 (D.C. Cir. 1950), cert. denied, 340 U.S. 828 (1951); United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir.), cert. denied, 340 U.S. 827 (1950).

B. The CAB Is Not Contemplating Changes In Its Regulations Which Will Legalize TWA's Control Over The Travellers Group

Lastly, appellant TAS suggests (Br., pp. 26-27) that District Court action will intrude upon "evolving [CAB] policy." Judge Stewart rejected this argument, saying (App. 107-108):

> Defendants suggest that the CAB may be in a process of re-evaluating some of its current rulings concerning the extent to which direct carriers may be involved in all kinds of charter operations. We recognize that such questions as when it is in the public interest for the CAB to allow a direct carrier to market charters through a controlled affiliate and whether changes in any of the current rules and regulations may be necessary to further the public interest, involve matters of policy which are appropriate for the CAB and Congress to decide. However, we are not being asked to rule on these questions in this action. We are, rather, being asked to determine whether the defendants TAS, TITO and TI are controlled by the defendant TWA so as to make the current charter arrangements between TWA and the other defendants violative of 49 U.S.C. §1371(a). Thus, we do not think that the policy issues raised by defendants are involved here and we do not think it either necessary or appropriate for us to defer to the CAB. (Emphasis supplied.)

Supporting the District Court's view are several points. First, appellant TAS exaggerates the relevance here of any Board policy reviews.[36/] The simple fact is that nothing before the Board will legitimize the illegality at issue, viz., TWA's control over a supposedly independent tour operator, Travellers. As noted earlier, the CAB has uniformly required that a tour operator must be "an independent principal"-- that is, not controlled by an airline (see pp. 7, 26-28, supra). Although some airlines have asked the Board to change this policy, the mere pendency of those requests does not alter that policy as it presently exists.

In any event, even a new Board policy in this area would not legitimize TWA's control of the Travellers entities. This is because TWA has never filed an application requesting CAB approval of the relationship under section 408 of the Act, 49 U.S.C. 1378. That statutory provision makes it unlawful for such control relationships to exist without prior CAB approval. The TWA/Travellers control relationship will thus remain illegal even if CAB policy changes.

36/ See Littell affidavit, filed in the District Court in support of plaintiffs' opposition to motion for rehearing, reconsideration and stay. R. 26. That affidavit explains why pending Board proceedings are not relevant to the issues here.

CONCLUSION

WHEREFORE, upon consideration of the foregoing, appellees respectfully request that the stay heretofore entered by this Court be vacated and that appellees' cross-motion to dismiss the appeal be granted.

DATED: April 13, 1977

Respectfully submitted,

DICKSTEIN, SHAPIRO & MORIN

By _____
Arthur J. Galligan

745 Fifth Avenue
New York, New York 10022
212-832-1900

Attorneys for Plaintiffs

Of Counsel:

Richard Littell
Barry Wm. Levine

CERTIFICATE OF SERVICE

The undersigned, an attorney duly admitted to practice before this Court, hereby certifies that on the 12th day of April, 1977, he caused true copies of the foregoing brief of plaintiffs-appellees to be served by hand upon Robert M. Beckman, Esq., and by express mail upon Harold L. Warner, Jr., Esq., and Howard Roy, Esq., attorneys for defendants-appellants herein, by causing same to be enclosed in sealed envelopes addressed as follows:

Robert M. Beckman, Esq.
Beckman & Smith
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Harold L. Warner, Jr., Esq.
Chadbourne, Parke, Whiteside & Wolff
30 Rockefeller Plaza
New York, New York 10020

Howard Roy, Esq.
Marshall, Bratter, Green, Allison & Tucker
430 Park Avenue
New York, New York 10022

Arthur J. Galligan

April 12, 1977